

## Environmental Law - Chicago's Third Municipal Airport - A Proposed Course of Action for Its Prevention

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## COMMENT

### ENVIRONMENTAL LAW—CHICAGO'S THIRD MUNICIPAL AIRPORT—A PROPOSED COURSE OF ACTION FOR ITS PREVENTION

#### INTRODUCTION

The vast metropolitan area of Chicago is presently served by two major airports—O'Hare International and Midway. Although it was once thought that these two facilities would be more than adequate to service the air traffic of Chicago, today, the prevailing view is that the nation's second largest city is in need of a third major airport. Why does Chicago need a new airport? The explanation is not very simple. In days past, it was a relatively easy matter to find a meadow far enough from any structures to be safe, and level enough to be comfortable for landing and take-off, but as aircraft grew more sophisticated, so, necessarily, did the attendant support-facilities and services. Consequently we progressed from the propellor to the jet; from the grassy knoll to asphalt and concrete pavements, continuous and uninterrupted for eight to twelve-thousand feet in length. Technology seems to know no bounds and as a result, "nearly all of the worlds terminal airports have one thing in common. They were either obsolete or inadequate on their dedication day."<sup>1</sup> This statement is supported by a myriad of statistics, all of which lead to the conclusion that air travel is increasing at a tremendous pace. Past predictions as to the volume of passengers, the number of aircraft required to transport them, and the size and number of the airports necessary to accommodate the air traffic were unfortunately much too inaccurate.

An examination of available statistics reveals the growing disparity in the types of travel utilized. For the year 1968 the number of passengers traveling via railroad exceeded 21 million; the number of motor traffic passengers for the same year was 80,414,200, while the number of air-traffic passengers was 183,242,000,000.<sup>2</sup> During this same period the average number of kilometers flown was 2,950,753,000.<sup>3</sup> It

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1. Donoghue, *Planning and Financing Chicago's Municipal Airports*, 23 J. AIR L. & COM. 34 (1956).

2. 1970 BRITANNICA BOOK OF THE YEAR 753 (1970).

3. *Id.*

should be obvious from these figures that a distinctly greater number of people employ air travel than any other mode of transportation, with this trend increasing by leaps and bounds.<sup>4</sup>

In 1955 Midway Airport handled 8,751,906 passengers and had total operations of 297,731.<sup>5</sup> One year later it was estimated that, in 1970, 21,256,000 people would pass through Chicago airports, and of this figure 5,500,000 would be passengers at Midway.<sup>6</sup> In addition, it was also estimated that the average number of passengers per aircraft would be 60 by 1970 and that total operations by 1970 would be 648,000.<sup>7</sup> These estimates however, have proven to be erroneous. As early as 1968 Chicago topped the figure predicted for total operations for 1970 by 40,000, and in 1969 O'Hare Airport handled approximately 32,500,000 passengers.<sup>8</sup> In sad contrast to these gargantuan statistics for O'Hare is the fact that utilization of Midway airport has decreased to a very negligible amount.

O'Hare now averages 85,000 travelers per day and, as a comparison of the above figures will reveal, this volume is straining its capacity. Further it has been predicted that the passenger volume by 1975 will hit 60,000,000 and by 1980 at least 87,000,000.<sup>9</sup> If past prophecies are any basis for reliance, these statistics are probably low. It is evident then, that "by the mid-70's delays in aircraft operations will reach unacceptable proportions without a third major airport."<sup>10</sup>

If one accepts the proposition that a third major airport is needed, the question quite obviously becomes—where? In order to find the answer, the city, through its Commissioner of Public Works, conducted several feasibility studies.<sup>11</sup> As a result of these studies four potential sites were located:

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4. As the number of planes and people to fill them have grown so too has the number of airports. In 1959 there were approximately 6,400 airports. By 1969 this figure had swelled to almost 11,000. 1970 REPORT OF THE AIR TRANSPORTATION ASSOCIATION 43, 44 (1970).

5. *Supra* note 1, at 36, 37.

6. *Supra* note 1, at 42-44.

7. *Supra* note 1, at 42-44. These figures were compiled in a study to determine the size and capacity of O'Hare Airport which was under construction at the time of the aforementioned article. The statistics were compiled by taking the 1955 figures for Midway and making calculated projections based upon the percentages of increase.

8. NEW YORK TIMES ENCYCLOPEDIA ALMANAC 1971 672-73 (1970).

9. DEPT. OF AVIATION, CITY OF CHICAGO, SITE SELECTION FOR CHICAGO'S THIRD AIRPORT (1969).

10. *Supra* note 9, at 2.

11. There were two such studies one by Harza Engineering Company and the

Site A: 12,100 acres of land in Will & Cook counties at the intersection of I-80 and I-57.

Site B: 12,600 acres of land in Will & Cook counties north of I-80 in Homer and Rich Townships.

Site C: 12,100 acres of land in Will & DuPage counties northwest of I-55.

Site D: Creation of an 11,000 acre polder site 5.5 miles east of 31st Street in Lake Michigan.<sup>12</sup>

One of the criteria to determine the ultimate site was cost. Hence, the conservative yet high estimated cost in dollars for each of these sites is: Site A—\$236.7 million; Site B—209.3 million; Site C—443 million; and Site D—423 million.<sup>13</sup>

In order to narrow the choice even more, other factors were taken into consideration. First an analysis of ground trips to each site was undertaken, based upon the assumption that each passenger would seek to minimize his costs in travelling between airports, and points of origin and destination. Next, the economic impact on the general metropolitan area, on the city, and on the available employment opportunities of each site was studied. Taking all of these factors into consideration, the Department of Aviation recommended to the Mayor that "the lake site is the most beneficial to the travelling public and to the entire metropolitan area."<sup>14</sup>

Once it was decided that the lake site would be best, further studies were conducted as to the manner and method of construction.<sup>15</sup> The resultant outcome of these studies was a suggestion that a below-surface site be constructed by means of a polder dike.<sup>16</sup> More specifically, the fin-

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other by Real Estate Research Corporation. The studies were begun in 1968 and summaries were submitted to the Commissioner in early 1970. In addition to the above authorized study, the Open Lands Project, a conservation group, conducted and published a study of its own in September of 1968.

12. REAL ESTATE RESEARCH CORP., CHICAGO AIRPORT SITE SELECTION STUDY (March, 1968). It should be noted that originally it was proposed to use 8,000 acres for the lake site this was later increased to 11,000. In addition the location has been tentatively moved to east of 55th Street.

13. *Supra* note 12. These cost estimates include the estimated market value of land and improvements in the site areas as of 1970, relocation of utilities and roadways, costs of demolition and grading and miscellaneous fees and contingencies. These figures are termed conservative since they do not reflect interest which at present would be about 6.5 per cent for a period of forty years and since the estimate for the lake site does not include the cost of an access route.

14. *Supra* note 9, at 5.

15. HARZA ENGINEERING COMPANY, LAKE MICHIGAN AIRPORT PROJECT (Feb. 26, 1970).

16. *Supra* note 15, at 1, 2. This concept consists of a dike surrounding an area of the lake bottom which will be dewatered over a period of three months

ished product would be circular in shape, consuming approximately 11,000 acres of space and requiring about 150,000,000 cubic yards of fill material.<sup>17</sup> At present it is to be located eight and one half miles east of 55th Street at a distance, by automobile, of nineteen miles from the Loop.<sup>18</sup> The time for construction was estimated at "two years for engineering and design plus five years for site construction, after which construction of aviation facilities . . . [would] begin."<sup>19</sup> At its completion it will be approximately four miles in diameter, seventeen and one half square miles in area and four and one half miles from the dike edge to the shoreline. The preliminary design calls for the runways to be situated with four parallel NW-SE runways and four parallel NE-SW runways all of which will be fifty to seventy-five feet from the top of the dike and approximately three-thousand feet from its base. Finally, although there has been no decision, or even a specific recommendation as to a mode of access, it appears that the option which is most favored is that of causeway and bridge from the shoreline to within four-hundred feet of the dike whereupon a tunnel would begin allowing nearly two-hundred feet of water for pleasure craft to pass over. Whether the access will be four lane or eight lane and will include rapid transit lines is undecided.<sup>20</sup>

The purpose of this paper is to analyze the aforementioned conclusion—that a third major airport is needed—with the discussion centered on a concomitant likelihood that the Lake Michigan site will be selected. The general hypothesis of this comment is that Lake Michigan is *not* the

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and maintained in that state by pumping. The dewatered area is generally termed a "polder," derived from the Dutch word used to describe such areas in Holland. This type of dike is not new; it has been used in Holland and elsewhere for 300 years.

17. *Supra* note 15, at 7. This fill in material is to consist of rock and sand, the acquisition of which also presents an interesting environmental question. The Harza report indicates without, however, recommending, that the sand may be garnered from the dunes at either Grand Haven, Michigan or inland locations in Illinois and/or Indiana. Similarly, one of the alternatives for obtaining the rock needed is the construction of a second polder dike over a natural rock bottom also located in Lake Michigan. *Supra* note 15, at 3, 8, 9.

18. An interesting aside, in view of the criteria used for selection, is that the auto distance from the Loop to O'Hare Airport is only eighteen miles.

19. *Supra* note 15, at summary letter.

20. As to the foregoing facts concerning the lake site construction *see generally supra* notes 12, 14, 15; THE OPEN LANDS PROJECT, WILL A LAKE AIRPORT BEST SERVE THE CHICAGO AREA (September, 1968). The Harza report summary although, as stated, made no recommendation as to the access, did contain a delineation of the types of access and their estimated costs. These costs were not based upon any specific design but rather were based on comparison with structures similar to those which might be used. A table of these costs are set out below to provide another insight into yet another facet of the cost of a lake site.

most appropriate spot for a third major airport. This hypothesis is not, it should be pointed out, based upon any hard and fast evidence which dictates disaster if a major airport were constructed along Chicago's shores but rather it is the response to the unanswered questions of the studies thus far conducted concerning the lake airport, the lack of extensive studies of the environmental effects of a lake airport, and, most of all, the total disregard of other sites for a third airport, which, although appearing more practical, are evidently less romantic.

Once the assumption is made that Lake Michigan is not the most advantageous spot for a third major airport and once it is assumed that this fact will nevertheless not dissuade the bureaucratic machinery, the foundation is laid for the dissertation which follows—the prevention of the proposed lake airport. The purpose of this paper then will be to examine the various methods by which an individual can take effective action to prevent the construction of an airport in Lake Michigan. The steps to be taken, both judicial and administrative, will be explored, as well as the theories behind them. The comment has been laid out chronologically—that is, an attempt has been made to envision the various procedures which the city will have to take prior to actual construction; and hence a corresponding preventative action has been proposed for each step that the city must take.

#### ACQUISITION OF THE LAND

The first logical step toward the completion of a lake airport is the acquisition of the land upon which it will be constructed. But from whom

##### *Legend*

- T = all tunnel access. Rapid transit connects to vicinity of McCormick Place  
 B = all bridge access  
 BT = bridge with 2-mile tunnel adjacent to polder  
 TB = bridge with 1-mile tunnel adjacent to shore  
 V = rubber-tired vehicular traffic  
 RT = rapid transit traffic on tracks

##### *COST*

(millions of dollars)

Shore Connection	Scheme	4 lane V only	8 lane V only	4 lane V + RT	8 lane V + RT
McCormick Place Vicinity	B	76	152	108	184
	BT	99	198	136	235
	TB	88	176	122	210
	T	170	340	218	388
55th Street Vicinity	B	50	100	72	122
	BT	74	148	99	173
	TB	62	124	85	148
	T	112	224	161	274

must the city acquire the land—that is, who owns the land beneath Lake Michigan?

In an effort to determine who owns these beds, attention must be directed to the common law of England where the origins of our present water law may be found. Under the common law it was recognized that the Crown owned the beds beneath the tidal waters and the rivers, subject to the right of the people to fish and navigate these waters.<sup>21</sup> Since the ownership of these lands was an attribute of sovereignty, when the colonies became independent they succeeded to that ownership.<sup>22</sup> However, this ownership applied only to tidal waters because England had no large inland bodies of water. Consequently, the doctrine of navigable and non-navigable waters was invented to provide a dichotomy by which it could be determined whether title to the beds of the large inland bodies of water in the United States vested in the state in trust for the public or in the hands of the private riparian owners.<sup>23</sup> Hence a definition of navigability was formulated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or, are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . . [They constitute navigable waters] when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried or with other states or foreign countries. . . .<sup>24</sup>

The consequences of a body of water being defined as navigable are seen in the decision of *Pollard's Lessee v. Hagan* wherein it was decided that upon the admission of a state into the Union, the title in the lands below the high-water mark of navigable waters passed to the state.<sup>25</sup>

Even though a few states allow private ownership to extend below the

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21. WATERS AND WATER RIGHTS §§ 35.2-35.2(A) (Clark ed. 1967); see also 1 FARNHAM, WATERS AND WATER RIGHTS § 36 (1904); FRANKEL, LAW OF SEASHORE, WATERS AND WATER COURSES, MAINE AND MASSACHUSETTS (1969); HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (2d ed. 1875); Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918).

22. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

23. WATERS AND WATER RIGHTS § 37.2(c) (Clark ed. 1967).

24. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). In Illinois navigable bodies of water include all waters that are navigable in fact and a body of water is navigable in fact if it was capable of being navigated in its natural state and is presumed navigable if it was meandered (as was Lake Michigan). MANN, ILLINOIS WATER USE LAW 12, 13 (1957). See also *Wilton v. Van Hessen*, 249 Ill. 182, 94 N.E. 134 (1911); *People v. Economy Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).

25. 44 U.S. (3 How.) 212 (1845).

high-tide line, the general rule is that the states acquired ownership of tidelands and lands beneath navigable waters by succession to that attribute of colonial sovereignty,<sup>26</sup> or as an attribute of state sovereignty upon admission to the United States.<sup>27</sup> Hence, although the United States made many grants to private owners, it retained title to the beds beneath the tidelands and the navigable waters,<sup>28</sup> to be held "in trust for the people of the future states, and upon admission to the Union each new state took title and succeeded to the trusteeship."<sup>29</sup> As the Supreme Court said in 1892:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States, belong to the respective States within which they are found. . . . The same doctrine is in this country *held to be applicable to lands covered by fresh water in the Great Lakes* over which is conducted an extended commerce with different States and foreign nations.<sup>30</sup>

Since Illinois was admitted to the Union in 1818 on an equal footing with original states and without distinction as to sovereignty or jurisdiction, and because the Great Lakes are navigable waters within the definition of these cases, it must be concluded that Illinois acceded to the title to the land beneath the lake.<sup>31</sup> Based upon that conclusion it must be con-

26. *Morris v. United States*, 174 U.S. 196, 226 (1899); *supra* note 22, at 410, 416. *Cf. Shively v. Bowlby*, 152 U.S. 1, 15 (1894).

27. *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 16 (1935); *Port of Seattle v. Oregon & W. R. Co.*, 255 U.S. 56, 63 (1921); *United States v. Mission Rock Co.*, 189 U.S. 391, 405 (1903); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *Weber v. Board of State Harbor Comrs.*, 85 U.S. (18 Wall.) 57, 65 (1873); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

28. *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894); *Shively v. Bowlby*, 152 U.S. 1, 48, 51, 58 (1894); *San Francisco City and County v. LeRoy*, 138 U.S. 656, 671 (1891); *Knight v. United Land Assn.*, 142 U.S. 161, 183 (1891); *Railroad Co. v. Schurmeier*, 74 U.S. (7 Wall.) 272, 287 (1868); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 74 (1855); *Den v. The Jersey Co.*, 56 U.S. (15 How.) 425, 432 (1853); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229, 230 (1845). *Cf. Utah v. United States*, 304 F.2d 23 (10th Cir. 1962). *See generally* *Bade, Title Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940).

29. WATERS AND WATER RIGHTS § 36.4(A), 195 (Clark ed. 1967). *See also* cases cited *supra* notes 25, 26, 27.

30. *Illinois Central R.R. Co. v. Illinois* 146 U.S. 387, 435 (1892) (emphasis added).

31. It is interesting to note that in the *Illinois Central* case the Supreme Court appeared to say that Illinois took title to the bed of Lake Michigan from her Wisconsin borderline (42° 30' latitude) to the middle of the lake. "It is sufficient for our purpose to observe that they (the boundaries of the state) include within their eastern line all that portion of Lake Michigan lying east of the mainland of the state and



ceded then that if Chicago can obtain title to this land, an airport may be constructed upon it.<sup>32</sup>

#### ARGUMENTS AGAINST A LAKE AIRPORT

It would be pertinent then, to inquire whether the state of Illinois *can grant* the title to these lands to Chicago and perhaps whether they *should grant* the title.

If the opinions of the Open Lands Project, several downstate representatives and other activist groups,<sup>33</sup> are to be considered, the answer to the latter question is a resounding "no." The arguments of these groups may be summarized as follows.<sup>34</sup>

#### COST

As was indicated earlier the cost of a lake site may run as high as one billion dollars<sup>35</sup> before a single runway has even been built. This figure is greatly in excess of the cost of acquisition of a land site.

#### TIME

It has already been shown that by 1975 O'Hare will have exceeded its capacity, yet the time schedule as indicated in the Harza report to the

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the middle of the lake, south of latitude 42 degrees and 30 minutes." *Supra* note 30, at 434. The general rule, however, is that the riparian owner be it a state or an individual may claim only the bed of the water within which an extension of his property lines would lie, e.g., Illinois should have title to the beds from the Indiana borderline (extended upward) to the Wisconsin borderline (extended east). The relevance of this point is apparent upon reexamination of the land to be used by the City as the site for the lake airport. It is notable that both proposed locations (31st Street and 55th Street) include at least some land which theoretically *belongs to Indiana*.

32. See the discussion in *supra* note 31.

33. As mentioned previously, The Open Lands Project has fought vigorously against the proposed airport having published a large fifty-six page rebuttal and several leaflets condemning the proposal. Similarly, State Representatives Epton, Maragos, Mann and Klein have introduced bills in the legislature to prohibit an airport in the lake. House Bill 48 introduced by Representative Bernard Epton provides a rather simple solution; it merely amends ch. 19, § 65 of the Illinois Revised Statutes to read: "The construction of any airport facility in any part of Lake Michigan included within the boundaries of Illinois is prohibited." This bill has passed the House and is now in the Senate. Other groups which are opposed to a lake site are the Chicago Pilots Association and the Businessmen for the Public Interest.

34. See generally THE OPEN LANDS PROJECT, *supra* note 20. Cf. Donoghue, *supra* note 1; Berger, *Nobody Loves an Airport*, 43 S. CALIF. L. REV. 631 (1970).

35. See text and footnotes *supra*.

Department of Aviation puts the completion date for a lake site at sometime late in 1977 or early 1978.

#### POPULATION

"Current demographic studies indicate a continuing population growth outward from Chicago, and the area southwest of the City is expected to be the area of fastest growth in the next several decades."<sup>36</sup> More specifically, the areas south of Chicago, including south suburban Cook and Will Counties will grow most rapidly in the future. There are predictions that these counties will surpass the northern and western suburban areas in population within the next thirty years.<sup>37</sup> It should be obvious therefore, that an airport site located in the lake will have no travel-time advantage for a majority of our future population and on the contrary would prove to be an inconvenience.

#### POLLUTION

Jet exhaust fumes as well as the exhaust fumes from the autos moving to and from the airport along a four or eight lane highway may create a serious air pollution factor.<sup>38</sup> Recent studies show the principal sources of combustible contaminants in America to be: (1) private industry—nineteen percent; (2) electrical power generation—twelve percent; (3) space heating—six percent; (4) refuse disposal—three percent; and (5) transportation—sixty percent.<sup>39</sup> The effect of these increased amounts of SO<sub>2</sub>, CO, and NO upon the lake water and the inhabitants of the lake cannot be discounted. Similarly, because a large majority of the prevailing winds blow over the lake through the city, instead of fresh lake air Chicagoans

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36. THE OPEN LANDS PROJECT, *supra* note 20, at 6.

37. See generally POPULATION RESEARCH AND TRAINING CENTER AND CHICAGO COMMUNITY INVENTORY (UNIVERSITY OF CHICAGO), POPULATION PROJECTIONS FOR THE CITY OF CHICAGO AND THE CHICAGO METROPOLITAN AREA: 1970 AND 1980 (1964); NORTHEASTERN ILLINOIS PLANNING COMMISSION, POPULATION FORECASTS FOR COUNTIES AND TOWNSHIPS IN NORTHEASTERN ILLINOIS: 1975, 1985, AND 1995 (1968); NEW YORK TIMES ENCYCLOPEDIA ALMANAC 1971 (1970).

38. See *supra* note 20 at 40-41; LANDAW & RHEINGOLD, THE ENVIRONMENTAL LAW HANDBOOK 275-94 (1971), wherein the authors depict two very recent suits one against nine airlines by the New Jersey Department of Health for violating that state's Air Pollution Control Code and one by a California attorney on behalf of the people of Los Angeles against two hundred polluters including General Motors for discharging enormous amounts of pollutants (generally auto exhausts) allegedly constituting a public nuisance. See also Chicago Sun-Times, April 22, 1971 at 7, 24, col. 1.

39. Kalika, *The Growing Problem*, 39 MACHINE DESIGN 19 (1967); see also GRAD, ENVIRONMENTAL LAW § 3.01 (1971).

would receive continuous doses of these contaminants.<sup>40</sup> To date the city has made no studies as to the effect on the air environment of a site located in the lake, nor, to be sure, has anyone else.

As to water pollution the Harza report concludes that: (1) construction of the dike itself will have no harmful effects except to displace many fish; (2) waters generated within the dike area will be returned to the city for treatment (by a new filtration plant?); (3) the improved design of aircraft indicates that by 1972 aircraft emission will not cause water pollution; and (5) the five mile buffer zone will prevent any degradation of the water currents.<sup>41</sup>

The biggest objection to the above conclusions is that the airlines have not stopped discharges which could contaminate the water. The airlines have been cited by the National Air Pollution Control Administration and have been asked to halt the dumping of about thirteen million pounds of jet fuel each year in the skies surrounding the airports. These fuel emissions plus the hydrocarbons exhausted as the jet fuel burns could have a disastrous effect on the plankton and other life in the lake water.<sup>42</sup>

The creation of an airport anywhere brings the attendant hazards of incessant, unbearable noise. Only recently a study was disclosed which proposed purchasing huge acreage surrounding O'Hare Airport and rezoning it for industrial use to create a buffer zone between the airport and residential areas.<sup>43</sup> Therefore, it is necessary that any airport make adequate provision for noise.<sup>44</sup> The argument that a lake airport would alleviate jet

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40. While it is not within the scope of this discussion to investigate the background and hazards of air pollution in depth it is important to understand that the possibility of the air being further polluted is quite serious. Why? Because there is no way to clean the air once it becomes polluted. Air pollution is for the most part a phenomenon of urban living that occurs when the capacity of the air to dilute the pollutants is overburdened. It is true that plants will increase the amount of oxygen in the air, but they cannot remove the particulate matter nor the other types of noxious gases. Hence, when cleaning up the air is discussed what is really meant is the prevention of adding additional pollutants to what is already in the atmosphere.

The consequences of failing are the results of polluted air. "Polluted air is causing, or aggravating bronchitis, asthma, emphysema, and lung cancer. It is making people more susceptible to pneumonia, and making it hard for elderly persons to breathe." NELSON, *AMERICA'S LAST CHANCE* 8 (1970). See also GRAD, *supra* note 40, at § 3.01, 6-7.

41. *Supra* note 20, at 13, (14).

42. See generally Chicago Sun-Times, April 22, 1971, at 7, 24, col. 1.

43. Chicago Today, July 26, 1971, at 1, 22, col. 1.

44. It should be noted that the reason why provision for excess noise by aircraft must be made by the planners is because litigation by residents is almost invariably futile when they are seeking injunctive relief. See, e.g., *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio, 1930); *Brandes v. Mitterling*, 67 Ariz. 349, 196 P.2d 464 (1948); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942);

aircraft noise is specious. A lake airport would result in the concentration of this noise over what is now densely populated residential areas.<sup>45</sup>

#### DESTRUCTION OF NATURAL BEAUTY

One of the arguments which is most onerous to both the planners and the protesters of the proposed lake site is that, if allowed, the lake airport would destroy the scenic beauty of our shoreline. Although this argument is discounted simply because aesthetic qualities are incapable of empirical measurement, it is one of the strongest arguments one can espouse. No one can measure the damage to the environment which would be caused by strip mining the Grand Canyon or turning Yellowstone Park into a waste disposal center; yet surely no one would advocate these things. Similarly, the loss of so much of our lake would have no less catastrophic an effect.<sup>46</sup>

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Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930); Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (1960); Crew v. Gallagher, 358 Pa. 541, 58 A.2d 179 (1948); Batcheller v. Commonwealth, 176 Va. 109, 10 S.E.2d 529 (1940).

Nearby residents to airports have made some inroads, however. Today most courts allow a recovery for noise damage by means of a taking under the fifth amendment. The theory being that an easement was created by the flights over the property which diminished its use and consequently its value. This is somewhat of a Pyrrhic victory to the man who thinks his home is his castle. See, e.g., United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1961).

45. See THE OPEN LANDS PROJECT, *supra* note 20, at 27-34. Cf. Goldstein, *Jet Noise Near Airports: A Problem in Federalism, Property Rights in Air Space and Technology*, in PORT OF NEW YORK AUTHORITY, COMMENTS ON THE PROBLEM OF JET AIRCRAFT NOISE 2, 8 (1966); Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966). "For the current large commercial aircraft, the zone of excessive noise extends outward a distance of about five miles beyond the runway for a half width of  $\frac{3}{8}$  of a mile (each side of centerline for takeoff) and for landing a distance of about four miles for a half width of  $\frac{1}{8}$  mile. Within these zones near a major airport, outdoor living is intolerable and residences, schools, churches, hospitals and all other uses which should enjoy reasonable peace and efficiently function must be designed or corrected for adequate noise isolation." VENEKLASEN AND ASSOC., NOISE EXPOSURE AND CONTROL IN THE CITY OF INGLEWOOD, CALIFORNIA 159 (1968). It should be evident then that since at least two runways will be facing directly toward the city and be five miles or less away, those along the lakeshore will experience the continuous din of aircraft emerging into the sky.

46. Bernard S. Cohen, a recognized figure in environmental litigation, in a recent article, argues very strongly against wholesale use of the "destruction of natural beauty" argument. He points out that it is important to fully understand the problem you are attempting to solve as well as the solutions proposed. To do otherwise is to propagate the environment for the environment's sake—to trade one evil for another—what he calls the "engineering mentality." 76 CASE AND COMMENT 3 (Sept.-Oct. 1971).

## PANDORA'S BOX

There is consensus among airport planners and designers that airports need to occupy ever increasing areas and that one of the consequences of building an airport is the immediate growth in population in surrounding areas.<sup>47</sup> It is, therefore, only natural to assume that even if all the studies made heretofore are correct they will prove futile as to the protection of the environment and the lakefront. Shortly after the runways are laid, new and nearby housing will be needed for the airport employees,<sup>48</sup> hotel and motel chains will compete vigorously for lakefront leases to house incoming passengers,<sup>49</sup> and new access highways will be called for to alleviate the traffic jams occurring on the single access four lane highway.<sup>50</sup> The list goes on *ad infinitum*, *ad nauseum*.

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47. See, e.g., Donoghue, Planning and Financing Chicago's Municipal Airports, 23 J. Air L. & Com. 34, 58, 66 (1956). "Extreme effort must be made to develop the maximum amount of non-aviation revenue for the air . . . . If attractive concessions and services are offered to the passengers . . . they will be patronized widely and provide the terminal operator with income to offset some of the heavy expense. . . ." *Id.* at 66. The author also suggests leasing land at the end of the runways to industries whose use wouldn't conflict with the airport use in order to help bear the brunt of the operating expenses. See also Comment, *Air Law—The Memory Lingers On: Ad Coelum in the 1970's—Some New Approaches*, 20 DEPAUL L. REV. 525 (1971); Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966); Walther, *Effect of an Airport on Real Estate Values*, in PORT OF NEW YORK AUTHORITY, A REPORT ON AIRPORT REQUIREMENTS & SITES IN METROPOLITAN NEW JERSEY—N. Y. REGION (1961); Walther, *Effect of Jet Airports on Market Value of Vicinage Real Estate* 27 APPRAISAL J. 465 (1959); Walther, *The Impact of Municipal Airports on the Market Value of Real Estate in the Adjacent Areas*, 22 APPRAISAL J. 15 (1954). Note also that in a study of the effect of a new airport in New York it was concluded that "the very existence of an airport creates its own demand for housing. Those people who are employed both at the airport itself and at the industrial plants attracted to the area by the presence of the airport will require housing." Hammer and Co., Assoc., *The Economic Effects of a New Major Airport*, in PORT OF NEW YORK AUTHORITY, *supra* note 47, at 14.

48. "It is an interesting fact that whenever airports are built, they immediately are surrounded by new real estate development." Letter from Austin J. Tobin, Executive Director Port of New York Authority, to Norman N. Newhouse, editor Long Islands Press, September 27, 1962, cited in Berger, *supra* note 34, at 671.

49. "Airports attract all sorts of industrial uses because of the availability of rapid transportation. These in turn attract commercial interests to service the industries." Berger, *supra* note 34, at 675. See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). "When land is no longer available for development, pressures build to "make" new land. It is not uncommon for states to convey submerged lands to private owners. . . ." *Id.* at 503.

50. "Even if all of this . . . traffic could be handled by a single four or six-lane roadway to the airport, the effects of bad weather . . . (or) a major traffic accident . . . could block access to the airport completely for hours or days. . . . [I]t is obvious (then) that additional roadways from the shoreline to the airport would be required. . . ." THE OPEN LANDS PROJECT, *supra* note 20, at 38.

The logical inference to be drawn from all of these considerations is that a lake site for Chicago's third major airport should not be the preferred choice. There are too many unanswered questions and too many questionable answers. Attention must next be given to whether the state can grant the title to the Lake Michigan beds to the city for use as an airport. More specifically, is it possible to stop the grant of title to the City of Chicago? One means which might be utilized effectively toward this end is the public trust doctrine.

#### PUBLIC TRUST DOCTRINE

The public trust doctrine<sup>51</sup> is far from recent. Its origins may be readily discerned in the common law and in the early writings of England.<sup>52</sup> Its basis is, as pointed out previously, that initially the sovereign or Crown owned title to the beds of the tidal waters beyond the high water mark subject to certain rights of the public—these rights being generally the right of navigation and of fishing.<sup>53</sup> This trusteeship was in turn passed on to the federal government and then to the states. The very essence of this doctrine is that there are resources which have required ages for their accumulation to the intrinsic value and quality of which human agency has not contributed, [for] which there are no known substitutes, [and they] must serve as the welfare of the nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the nation rather than for the benefit of a few individuals. . . .<sup>54</sup>

Hence, the government, be it state or federal, is the public guardian of those valuable natural resources which are not capable of self regeneration and for which substitutions cannot be made. In this role the government has a high fiduciary duty of care and responsibility to the general public which may not be abandoned by acquiescence<sup>55</sup> or "wholly alienated by the states."<sup>56</sup>

51. LANDAU & RHEINGOLD, *THE ENVIRONMENTAL LAW HANDBOOK* 1.8, 2.4, 4.9, 5.8 (1971); 1 *WATERS AND WATER RIGHTS* § 36.4(B) (Clark ed. 1967); SAX, *DEFENDING THE ENVIRONMENT* (1970); Cohen, *The Constitution, The Public Trust Doctrine and the Environment*, 1970 UTAH L. REV. 388 (June 1970); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); SATURDAY REVIEW, Oct. 3, 1970, at 55.

52. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *supra* note 51 at 475.

53. *Supra* note 51 at 476.

54. Report of The National Conservation Commission, S. Doc. No. 676, 60th Cong. 2d Sess. 109 (1909).

55. *State v. Cleveland and Pittsburgh R.R.*, 94 Ohio St. 61, 80, 113 N.E. 677, 682 (1916).

56. *Brickell v. Trammell*, 77 Fla. 544, 559, 82 So. 221, 226 (1919).

The exact length and breadth of that trusteeship, however, is as yet ill defined. It is not an absolute trust completely beyond the police power of the state, but by the same token to make it subject to mere reasonable exercise of police power subject to judicial review is to abdicate its purpose. The result has been that the courts have formulated a meaning somewhere between these two poles. This meaning is composed of several considerations. If these considerations are met, a grant of trust property will be upheld. If they are not, the grant will be struck down whether it be to an agency of the government<sup>57</sup> or to an individual.<sup>58</sup>

The most significant standard is that the transfer be necessary for the promotion and benefit of the public beneficiaries of the trust. One consideration in determining necessity is whether or not there is an alternative to the transfer of the trust property. In further considering the necessity of the proposed transfer the courts consider certain indicia in determining whether or not the public interest will be promoted. These indicia of promoting the public interest include: (1) public control; (2) public use and purpose; (3) will the resource be changed (e.g., will a lake remain a lake or will an estuary remain an estuary); (4) will other uses of the resource be greatly impaired; (5) will the change offer greater convenience to the public at large.<sup>59</sup>

As already noted, the bed of Lake Michigan from the high water mark belongs to the state which holds it in trust for the people.<sup>60</sup> Bearing in mind the above criteria for granting this trust property to another, it may be beneficial to examine the leading case involving the trust doctrine.

In the case of the *Illinois Central Railroad v. Illinois*,<sup>61</sup> the Illinois legis-

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57. See, e.g., *Sacco v. Department of Public Works*, 352 Mass. 670, 227 N.E.2d 478 (1967) in which the residents of a town enjoined the Department of Public Works from filling a "great pond" (lake) to relocate a state highway.

58. See, e.g., *Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1966) and *Priewe v. Wisconsin State Land and Improvement Co.* 93 Wis. 534, 67 N.W. 918 (1896).

59. *Fairfax County Fedn. of Citizens Assns. v. Hunting Towers Operating Co.*, Civil No. 4963A (E.D. Va. filed Oct. 1, 1968) a recent and successful use of the trust doctrine since the builders withdrew their plans on July 10, 1970 and the action was dropped; *State v. Public Service Commission*, 275 Wis. 112, 118, 81 N.W.2d 73, 74 (1957), wherein most of these factors were initially set out.

60. See text and footnotes *supra*.

61. 146 U.S. 387 (1892). The case is interesting in many ways and compares favorably with the facts presented in the present instance. First both involve a large grant of land in Lake Michigan—the lake site will need eleven thousand acres, the Illinois Central got one thousand acres. Secondly, both involve transportation facilities, which were and are in their separate capacities extremely necessary at their particular juncture in time.

lature made an extensive grant of about one thousand acres of submerged lands in fee simple to the Illinois Central Railroad. That grant included all the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along the central business district of Chicago. Four years after the original grant the legislature repented and brought an action to have the original grant declared invalid. The Supreme Court upheld the state's claim holding an express conveyance of this type *involving trust lands* to be beyond the power of the legislature. They concluded:

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits. . . . But it is a title different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, . . . so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is . . . grants of parcels which, being occupied do not substantially impair the public interest in the lands and waters remaining, that are . . . sustained in the adjudged cases as a valid exercise of legislative power. . . .<sup>62</sup>

The *Illinois Central* case provides, then, a broad base upon which an action could be brought to prevent a grant by the state to the city of the adjacent beds in Lake Michigan for the expressed purpose of building a lake airport thereon. Admittedly, the *Illinois Central* case leaves a few voids; namely, that it was a suit against a private party, whereas the proposed suit would be against a municipality. Furthermore, the problem of standing arises, since the *Illinois Central* action was brought by the Attorney General on behalf of the people of the state asking for redress for the legislature's previous action in granting the property; the proposed suit, on the other hand, would involve one citizen or a group. However, the problem of standing may no longer be a barrier because several recent cases have opened the way to class suits by concerned conservation groups.<sup>63</sup>

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62. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

63. The basic question dealing with standing is how minimal the interest a person or group suing may have in the matter of the lawsuit and yet be allowed to bring action. In *Flast v. Cohen*, 392 U.S. 83 (1968) the Supreme Court held that a taxpayer is within the "zone of interest" necessary to give him standing to challenge an expenditure of public funds. The Court followed this with a decision that business groups who would be only slightly affected by the government's activities had standing. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). But the leading decision in this area is *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).



That the suit is against a municipality as opposed to being against an individual would not in and of itself bar the success of the suit. As stated previously, suits against a legislative body or an agency may be as successful as a suit against a private grantee if the aforementioned criteria are met.

Although there is a very distinct probability that a suit of this type could be won,<sup>64</sup> what are the alternatives if it should fail? There are several, the first of which would be an action to prevent the city from proceeding with the fill-in itself. That is, assuming an action has been brought against the State to restrain it from granting title to the land beneath Lake Michigan and this action has been lost, it would be incumbent to try to prevent the actual construction. One manner of doing this is found in the Illinois statutes.

Since the Illinois Constitution now permits an individual (or many individuals *i.e.*, a class action) to bring suit against a polluter on his own behalf, the Illinois statutes would provide an effective basis for a complaint.<sup>65</sup> Similarly, the Attorney General's office could also contest the fill-in. However, as will be seen, there are several administrative procedures which may first be utilized, before a complaint is brought.

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wherein the federal court determined that the conservation group had standing to intervene in the FPC hearings as an "aggrieved party," although it had no appreciable economic interest in the area. "Special interests," such as the preservation of scenic beauty, fish and wildlife have also been deemed sufficient. *See also* Nashville 1-40 Steering Comm. v. Eillington, 387 F.2d 179 (6th Cir. 1967), *cert. denied* 390 U.S. 921 (1968); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 944 (D.C. Cir. 1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967).

64. As set out in the text the criteria for the setting aside of a grant of trust property seem to have been adequately met in the present instance. That is, initially the property transferred will not benefit all the public whether or not it will benefit a substantial majority is not even known. Secondly, there are several reasonable and in many respects better alternatives to the trust property proposed. Thirdly, in consulting whether or not the public interest will be promoted it is plain to see that the public will not have complete control over the trust property; the resource itself will be considerably different from its proposed use (that of being a lake); other uses such as boating, swimming, fishing and beauty of the resource will be impaired; and finally the change will not offer any greater convenience to the public to justify the grant. *See also* ILL. REV. STAT. ch. 19, § 63 (1969) which provides a strong basis for contending that an action under the public trust doctrine could be fruitful: "The Department of Public Works and Buildings shall plan and devise methods, ways and means for the preservation and beautifying of the public bodies of water of the State, and for making the same more available for the use of the public. . . ."

65. "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." ILLINOIS CONST. art. XI, § 2.

## ILLINOIS STATUTES

The jurisdiction and supervision over all the public waters of the State of Illinois is in the Department of Public Works and Buildings, Division of Waterways:<sup>66</sup>

It shall be the duty of the Department of Public Works and Buildings to have a general supervision of every body of water within the State of Illinois, wherein the State or the people of the State have any rights or interests, whether the same be lakes or rivers, and at all times to exercise a vigilant care to see that none of said bodies of water are encroached upon, or wrongfully seized, or used by any private interest in any way, except as may be provided by law and then only after permission shall be given by said department, and from time to time for that purpose, to make accurate surveys of the shores of said lakes and rivers, and to jealously guard the same in order that the true and natural conditions thereof may not be wrongfully and improperly changed to the detriment and injury of the State of Illinois.<sup>67</sup>

The Department is given rather broad powers over public waters as defined. It has the power to inquire into encroachments and to make and enforce orders to secure public waters from encroachment, wrongful seizure, or improper private use.<sup>68</sup> It is the duty of the Department to investigate attempts to interfere with navigation<sup>69</sup> or attempts to assert rights with reference to docks and wharves, access to and egress from navigable waters,<sup>70</sup> to check all waters for encroachments,<sup>71</sup> to receive complaints of encroachments by any citizen and, on request, to hold public hearings, take evidence and enter orders defining the rights and interests involved and prescribing duties.<sup>72</sup> Further, the Department may make orders only after notice and hearing<sup>73</sup> and may bring an action in court to recover a fine of up to \$1,000 for failure to obey its orders.<sup>74</sup>

The most important portion of the act for the purposes at hand is section 65. Section 65 provides that it is

unlawful to make any fill or deposit of rock, earth, sand or any other material . . . or commence the building of any other structure, or to do any work of any kind whatsoever in any of the public bodies of water within the State of Illinois, without

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66. ILL. REV. STAT. ch. 19, §§ 52-78 (1969); MANN, ILLINOIS WATER USE LAW 13-15 (1957).

67. ILL. REV. STAT. ch. 19, § 54 (1969). This statement in and of itself would provide much of the basis for an action under the public trust doctrine.

68. ILL. REV. STAT. ch. 19, § 54 (1969).

69. ILL. REV. STAT. ch. 19, § 56 (1969).

70. ILL. REV. STAT. ch. 19, § 57 (1969).

71. ILL. REV. STAT. ch. 19, § 60 (1969).

72. ILL. REV. STAT. ch. 19, § 55 (1969).

73. ILL. REV. STAT. ch. 19, § 74 (1969).

74. ILL. REV. STAT. ch. 19, § 74 (1969).

first submitting the plans . . . to the Department of Public Works and Buildings . . . and receiving a permit therefor. . . .<sup>75</sup>

The section goes on to provide a restriction on said construction: "the building . . . shall be in aid of and not an interference with the public interest or navigation . . . ." <sup>76</sup> Even more beneficial is the provision which specifies that this section also applies to a "city or municipality."<sup>77</sup> As to penalties, section 65 is quite explicit and quite stringent: "Any structure, fill, or deposit erected or made . . . in violation of this Section . . . is a purpresture and may be abated as such at the expense of the . . . city, or municipality. . . ." <sup>78</sup> Further, although a permit may be issued there must be: (1) a statement approving the action by all the riparian owners whose egress to public water will be affected as a condition precedent to the granting of the permit; (2) approval of the Governor; and (3) a hearing preceded by ten days notice in a paper of general circulation.<sup>79</sup> Section 65, when read with other provisions in the act, presents a very real method of delaying and even halting any attempt to proceed with the building of an airport in the lake.

It is not illogical to assume that once the city has received a grant from the state that it would of necessity seek a permit to fill this land.<sup>80</sup> It would then be incumbent upon the citizenry to attend the public hearings provided for in section 65 and to voice objections. Those objections could be based upon section 54 of the act,<sup>81</sup> or section 63<sup>82</sup> or even section 65<sup>83</sup> or they could well include all these plus the public trust doctrine

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75. ILL. REV. STAT. ch. 19, § 65 (1969).

76. ILL. REV. STAT. ch. 19, § 65 (1969).

77. ILL. REV. STAT. ch. 19, § 65 (1969). This provision is both relevant and helpful since most of the other sections of the act (*i.e.*, §§ 54, 56, 60) speak of private encroachment and provide remedies for them. This section therefore specifically takes note that a city or municipality may also encroach upon public waters of the State and may also be punished for doing so.

78. ILL. REV. STAT. ch. 19, § 65 (1969).

79. ILL. REV. STAT. ch. 19, § 65 (1969). It should also be noted that each permit may last only forty years but may be renewed—a provision which has dubious value.

80. It is conceivable that the city might seek to get the permit first or attempt to get the grant and the permit simultaneously. In either case the logic remains the same and similar arguments could be used whichever course is taken.

81. ILL. REV. STAT. ch. 19, § 54 (1969) provides in part that the Department is "to make accurate surveys of the shores of said lakes and rivers, and to *jealously guard the same* in order that the *true and natural conditions* thereof may not be *wrongfully and improperly changed* to the detriment and injury of the State of Illinois." (emphasis added).

82. ILL. REV. STAT. ch. 19, § 63 (1969) indicates a desire to maintain and preserve the beauty of the public bodies of water in the state.

83. ILL. REV. STAT. ch. 19, § 65 (1969) rather succinctly phrases some of

pleas set forth previously. Should these arguments fail and a permit is granted by the Department, section 75(a) provides additional relief: "All final administrative decisions of the Department of Public Works and Buildings hereunder shall be subject to judicial review. . . ." <sup>84</sup> New actions could be brought and carried up the judicial ladder.

#### FEDERAL STATUTES

Nevertheless, even those actions brought under the Illinois statutes would be but a stepping stone; there are additional possibilities. Because of the duty of the federal government to maintain and regulate interstate commerce there have been many acts passed as the vehicles with which to implement those duties. One such act is the Rivers and Harbors Act of 1899.<sup>85</sup> Section 401 of that Act provides:

It shall not be lawful to construct or commence the construction of any *bridge*, dam, dike, or *causeway* over or in any . . . navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army. . . .<sup>86</sup>

The section goes on to add a provision that the type of structures aforementioned may be constructed without the approval of Congress, if it is wholly within the limits of a single state and that state legislature gives its consent.<sup>87</sup>

It would appear then, that for Chicago to construct the proposed causeway and bridge to the lake airport, they will need the approval of the legislature, and perhaps the Chief of Engineers and the Secretary of the Army.

The Act does not stop there, but section 403 states:

[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, *lake*, harbor or refuge . . . of any navigable water of the United States, unless the work has been *recommended* by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning same.<sup>88</sup>

This section provides even more impetus. Obviously the fill-in contem-

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the public trust doctrine defenses that grants must be in "the public interest" and in furtherance as opposed to hindering "navigation."

84. ILL. REV. STAT. ch. 19, § 75a (1969).

85. 33 U.S.C. §§ 401-13 (1964).

86. Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 (1964) (emphasis added).

87. 33 U.S.C. § 401 (1964).

88. Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1964) (emphasis added).

plated for the proposed lake site is of the type included in this section of the Act. Therefore, even before beginning construction, the project must be submitted to the Corps of Engineers and, in the final analysis, not merely rubber stamped but "recommended" by the Chief of Engineers.

It may be relevant then to inquire: (1) What are the criteria which the Corps uses; and (2) is its decision appealable through the judicial system?

The criteria which the Corps uses today are set out in the *Corps of Engineers Administrative Procedure*.<sup>89</sup> Pursuant to the National Environmental Protection Act<sup>90</sup> and other legislation relating to the environment,<sup>91</sup> a memorandum of understanding between the Department of the Army and the Department of the Interior was consummated on July 13, 1967, establishing policies and procedures for processing permit applications for dredging, filling and excavating in the navigable waters of the United States. One of the important policies of the letter which is now part of *Corps of Engineers Administrative Procedure* is:

The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the Army . . . will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.<sup>92</sup>

Similarly inclined is the procedure to grant the permit. Upon receipt of an application, all interested parties are notified including the various state conservation, resource and pollution agencies. These parties are then advised to conduct studies as to the proposed work and advise the District Engineers of any actual or potential pollution. The District Engineers will then hold public hearings. Finally, the District Engineers will weigh all of these factors and forward their recommendation to the Chief of Engineers and the Secretary of the Interior.<sup>93</sup>

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89. 33 C.F.R. § 209.120 (1970).

90. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (Supp. V 1970).

91. See, e.g., Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 466 et seq. (1964); Fish and Wildlife Coordination Act, as amended, 16 U.S.C. §§ 661-666c (1970); Fish and Wildlife Act of 1956, as amended, 16 U.S.C. §§ 742a et seq. (1970).

92. 33 C.F.R. § 209.120 (1970).

93. 33 C.F.R. § 209.120 (1970). These provisions are appropriately entitled "Procedures For Carrying Out These Policies."

In addition, the Corps must take cognizance of the National Environmental Policy Act in and of itself wherein a new policy recognizing the profound effect of each and every arm of governmental activity on the environment was formulated. Section 102 of that Act attempts to implement this policy by declaring:

The Congress authorizes and directs that . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —(i) the environmental impact of the proposed action, (ii) any adverse environmental effects . . . (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>94</sup>

However, to regard these phrases as a panacea would be gross error. All too often in the past the pen has lacked the finely honed edge necessary to cut through the debris and stop those who seek to advance in the name of industry rather than humanity. It is when these platitudinous phrases fail that other relief must be sought. This new relief may be found in the judiciary since under the Administrative Procedure Act<sup>95</sup> one has standing to gain review of an administrative action in court if he has "suffered legal wrong" or is "aggrieved by agency action." This section is not new and has been utilized many times but, more importantly, it may be utilized to appeal the issuance of a permit by the Corps of Engineers. In the case of *Citizens Committee For Hudson Valley v. Volpe*<sup>96</sup> the New York State Department of Transportation had proposed construction of a six-lane arterial expressway along a ten-mile stretch of the Hudson River's eastern bank. The proposed construction would have required the dredging and filling-in of a portion of the Hudson along the shoreline. Since the Hudson is a navigable water, the approval of certain agencies was needed. Pursuant to sections 401 and 403 of the Rivers and Harbors Act of 1899, the Corps of Engineers issued a permit for the construction of the highway. The plaintiffs in this action were two citizen conservation groups who appealed this finding basing jurisdiction on the Administrative Procedure Act, sections

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94. 42 U.S.C. § 4332 (Supp. V 1970). Since the Corps is an "Agency of the Federal Government" it should be readily apparent that any recommendation they make must be construed in light of this section. In addition any conclusion of the Corps must be accompanied by detailed explanation of any and all possible environmental effects.

95. 5 U.S.C. § 702 (1970). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

96. 425 F.2d 97 (2d Cir. 1970).

701 and 702. The appellate court ruled in favor of the plaintiffs. It is clear, therefore, that a hypothetical suit against the City of Chicago could be predicated on these same statutes and there is no reason to assume that an adverse ruling by the Corps could not be appealed in the same manner and, hopefully, with the same results.

Assume for the moment that title to the beds of Lake Michigan has been granted, the State of Illinois has issued a permit and the Corps of Engineers has done likewise. All the judicial actions thus far brought have failed. Yet there is one element necessary before construction may begin—money. Since the cost of a lake airport may run as high as one billion dollars, the city must somehow raise these funds to finance the construction. Furthermore, since securing a bond issue for an amount this large is doubtful, the city would definitely approach the federal government for the necessary funds. In so doing, a new method for prevention of the airport appears. This possibility is predicated upon several recent acts passed by the federal government to protect our natural resources and monuments. Although the theory is somewhat tenuous, it should be explored.

#### PROTECTION OF NATURAL RESOURCES AND MONUMENTS

One of the reasons advanced for seeking to halt the proposed airport in the lake is not the pollution possibilities, since they have not been truly ascertained as yet, but rather, the immediate destruction of the magnificent lake and its shoreline. To replace the aesthetic beauty of this huge body of water with a four or eight lane expressway and thousands of cubic feet of particulate matter from incoming and outgoing jets is abhorrent. In an effort to prevent the loss of our natural resources, acts have been passed to secure "national monuments," "historic landmarks," and "other objects of historic or scientific interest."<sup>97</sup> In 1935, Congress declared a national policy in favor of preserving historic sites, buildings and *objects of national significance* for the inspiration and benefit of the people of the United States.<sup>98</sup> For present purposes, the most important of these acts is the National Historic Preservation Act of 1966.<sup>99</sup> This act is prefaced with a most pertinent statement of declaration by Congress:

[I]n the fact of ever-increasing *extensions of urban centers, highways, and residential, commercial, and industrial developments*, the present governmental and nongovernmental historic preservation programs and activities are inadequate to in-

97. Antiquities Act of 1906, 16 U.S.C. § 431 (1970). See also National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1970).

98. 16 U.S.C. §§ 461-467 (1970) (emphasis added).

99. 16 U.S.C. §§ 470 *et seq.* (1970).

sure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation. . . .<sup>100</sup>

Section 407a of this act authorizes the Secretary of the Interior to prepare a national register of significant objects and resources in need of preservation and authorizes grants to be made to the various states for their protection.<sup>101</sup> Even more significant is section 470f which provides that the head of any federal agency

having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register.<sup>102</sup>

In effect, therefore, this provision prevents any federal funds from being allocated without consideration by the head of the agency making the allocation of the possible effects on items of historical and natural importance. This is not dissimilar to section 102 of the National Environmental Protection Act, previously discussed. Hence, it should be apparent that if the city of Chicago is to build an airport in the lake at a cost of about one billion dollars<sup>103</sup> federal funding will be required. The agency providing the money must therefore, consider the ultimate effect of the airport on the lake and shoreline of Chicago as a historical or natural resource, or more specifically its aesthetic aspects. Furthermore, under the Administrative Procedure Act,<sup>104</sup> this decision would be appealable through the courts.

In *Kent County Council For Historic Preservation v. Romney*<sup>105</sup> precisely this occurred. In early 1961 the city of Grand Rapids had applied for a loan from the federal government to be used in an urban renewal project. Part of the land in question contained the city hall which like most city halls was very old and was considered an historic monument. The plaintiffs sought an injunction to stop the construction based upon section 470f of the National Historic Preservation Act,<sup>106</sup> claiming jurisdiction under

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100. 16 U.S.C. § 470 (1970). Surely that "heritage" includes the Great Lakes just as it includes the Grand Canyon and the Liberty Bell.

101. 16 U.S.C. § 470 (1970).

102. 16 U.S.C. § 470 (1970). For the sake of argument it will be assumed the Lake Michigan as a part of the Great Lakes is at present included on the "National Register." As to whether an action could be brought to force the Secretary to include it has not been considered.

103. See text *supra*.

104. 5 U.S.C. § 702 (1970). For a discussion of the applicability of this provision see text and footnotes *supra*.

105. 304 F. Supp. 885 (W.D. Mich. 1969). See also *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

106. *Kent County Council For Historic Preservation v. Romney*, 304 F. Supp. 885, 888 (W.D. Mich. 1969).



section 702 of the Administrative Procedure Act.<sup>107</sup> Although the plaintiffs did not succeed because the court found that the National Historic Preservation Act is not retroactive,<sup>108</sup> no such impediment would prevent an action of this type against the building of a third major airport for Chicago.

#### CONCLUSION

The primary purpose of this discussion has been to examine a particular problem and to suggest methods of solving it. The solutions suggested are not intended to be exhaustive. In addition to those theories discussed above, there are a number of other possibilities which could conceivably and probably should be investigated. A number of these theories are based upon the "higher law" provisions in the Constitution and the Bill of Rights. For example, one may argue that there is an inalienable right, contained in the Constitution, to have clean air and water and to the protection of our natural resources. This right it may be argued, is embodied in the language of the ninth amendment which explicitly recognizes that there are certain rights, though not contained within the Bill of Rights, which exist and are not to be denied.<sup>109</sup>

One further tactic which could be used is of debatable value. It is of questionable value because it would be utilized after the fact—that is once the airport is constructed and is found to be causing some environmental damage, this strategy could be utilized. Unfortunately, since it would be used after the airport has been constructed and is in operation the relief granted would probably be diminished as the scope of the action had diminished. More specifically the plaintiffs would no longer seek to prevent the construction of the airport via injunctive relief but rather the specific pollution would be sought to be abated. The result would be that some of the problems referred to earlier would not be alleviated. For example, because compensation rather than injunctive relief would be granted to the sufferers of excessive airport noise,<sup>110</sup> the residents in the

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107. *Id.* at 889.

108. *Id.* at 888.

109. U.S. CONST. amend. IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See also, *Griswold v. Connecticut*, 381 U.S. 479 (1965); Esposito, *Air and Water Pollution: What to Do While Waiting For Washington*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 32 (1970). It should be noted that a strong basis for an argument of this type is to be found within the confines of the Illinois Constitution. Although phraseology is not strong enough to make a clean environment an absolute right the section does provide that it is "(t)he public policy of the State and the duty of each person . . . to provide and maintain a healthful environment for the benefit of this and future generations . . . ." ILLINOIS CONST. art. 11, § 1.

110. *Supra* note 44.

high rises on the lake would continue to suffer. Moreover, it is doubtful that any court or board would require the four or eight lane expressway to the airport to be removed simply because it caused air pollution which affected nearby bathers or presented an inconvenience to boaters who had to travel miles into the lake to bypass the airfield. For these and other reasons the Illinois Environmental Protection Act<sup>111</sup> is of dubious importance in the immediate instance. Hence, it and its provisions shall be mentioned only in passing.

Under the EPA anyone can make a complaint.<sup>112</sup> The regional office of the Environmental Protection Agency then investigates it and if pollution is occurring they notify the polluter.<sup>113</sup> If the problem is not corrected it may be referred to the Pollution Control Board,<sup>114</sup> a hearing is scheduled and notice given to the polluter.<sup>115</sup> At the hearing the Agency attempts to prove a violation; and citizens' testimony may be heard.<sup>116</sup> If a violation is proven, the polluter may attempt to show reasonable cause to remain operating (hardship) or that he is complying.<sup>117</sup>

A violator faces five possible penalties: (1) Up to \$10,000 for each violation; (2) up to \$1,000 a day for each day continued; (3) cost of fish or aquatic life killed by the violation; (4) injunction against continuing the violation; (5) revocation of a permit previously issued.<sup>118</sup> If the Board order is not obeyed, the Attorney General or the State's Attorney of the county in which the violation occurred can enforce the order

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111. ILL. REV. STAT. ch. 111½, § 1001 (1969).

112. ILL. REV. STAT. ch. 111½, § 1030-31 (1969).

113. ILL. REV. STAT. ch. 111½, § 1031 (1969).

114. ILL. REV. STAT. ch. 111½, § 1031 (1969).

115. ILL. REV. STAT. ch. 111½, § 1031 (1969).

116. ILL. REV. STAT. ch. 111½, § 1031 (1969).

117. "After due consideration . . . (of all the testimony and evidence) the Board shall issue and enter such final order . . . as it shall deem appropriate under the circumstances. . . . In making its orders and determinations the Board shall take into consideration . . . : (i) the character and degree of injury to, or interference with the protection of health, general welfare and physical property of the people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source." ILL. REV. STAT. ch. 111½, § 1033(a)(c) (1969). The foregoing is a list of the criteria recommended for use by the Board in determining whether or not injunctive relief is to be granted. The list is not to be all-inclusive. It does, however, provide an "out" if the Board so desires it, but it is a limited out since the act further provides that if "hardship" is found a written opinion need be written listing the reasons. ILL. REV. STAT. ch. 111½, § 1035 (1969).

118. ILL. REV. STAT. ch. 111½, § 1042 (1969).

by prosecution in the circuit court.<sup>119</sup> The Act also provides other interesting possibilities such as a variance wherein a polluter may continue to pollute for one year by showing hardship.<sup>120</sup> Nevertheless, the Act does have useful tools. Review by the appellate court is permitted for: (1) any party to a pollution board hearing; (2) any complainant whose hearing is denied; (3) anyone who is denied a variance or a permit; (4) any person adversely affected by a final order or determination by the pollution board.<sup>121</sup> Quite simply, an individual may utilize the court system under the EPA after having sought his remedy through the administrative measures set forth. If nothing else, however, these procedures are cumbersome and time consuming.

Just as the solutions offered were not intended to be exhaustive, so too, neither were they intended to be exclusive in their application to airports or to Lake Michigan. For example, the trust theory discussed previously, may be viewed as the basis of an action to prevent construction of the proposed stadium or to prevent further sale and development of lake front property for high rise apartments or other non-public uses.<sup>122</sup> Another possibility would be the use of the Rivers and Harbors Act of 1899 to prevent any further attempts to aggrandize Lake Michigan by Chicago or by any municipality.

Admittedly, there are problems yet to be unravelled with each of the theories discussed. The discussion was presented in terms of bringing one action after the other in an envisioned chronological sequence. Nevertheless, this would not be mandatory and it might even endanger the success of the actions. Many conservation groups have attempted to halt a particular polluter by bringing each action under each statute or common law theory at the same time. One difficulty in bringing subsequent actions would be the possibility of *res judicata* being used to defeat all actions following the first.<sup>123</sup>

In conclusion, it must be borne in mind that all to often:

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119. ILL. REV. STAT. ch. 111½, § 1042 (1969).

120. ILL. REV. STAT. ch. 111½, § 1036 (1969). See also *supra* note 117 for the criteria used.

121. ILL. REV. STAT. ch. 111½, § 1041 (1969). Most notable about this provision is that it allows the petitioning party to take his action directly to the appellate court.

122. A situation which could become more significant as the Army abandons more and more property along the lake deeding it back to the Chicago Park District.

123. See, e.g., RESTATEMENT OF JUDGMENTS §§ 62, 68 (1942); *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1904); *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

[T]he appropriate agencies hear and attend to the voices which call for getting the job of road building done as quickly and cheaply as possible. But there are also individuals who put a high premium on the maintenance of parks, wetlands, and open space. Are their voices adequately heard and their claims adequately taken into account in the decisional process?<sup>124</sup>

It is the hope and the motive behind this discussion that these voices will be heard—that the judiciary will, as they have in the past, utilize whatever means are necessary to ensure a government responsive to both majority rule and minority rights.

*Arthur H. Boelter, Jr.*

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124. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 496 (1970).